No. 17-8151

IN THE

Supreme Court of the United States

RUSSELL BUCKLEW,

Petitioner,

v.

ANNE PRECYTHE, *et al.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Should a court evaluating an as-applied challenge to a State's method of execution based on an inmate's rare and severe medical condition assume that medical personnel are competent to manage his condition and that the procedure will go as intended?

2. Does the Eighth Amendment require an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the State's proposed method of execution based on his rare and severe medical condition?

3. Must evidence comparing a State's proposed method of execution with an alternative proposed by an inmate be offered via a single witness, or should a court at summary judgment look to the record as a whole to determine whether a factfinder could conclude that the two methods significantly differ in the risks they pose to the inmate?

4. Whether petitioner met his burden under *Glossip v. Gross*, 135 S. Ct. 2726 (2015), to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's method of execution.

PARTIES TO THE PROCEEDING

The Petitioner is Russell Bucklew. The Respondents are Anne L. Precythe, Alana Boyles,* and Troy Steele, personnel with the Missouri Department of Corrections. No party is a corporation.

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* Pursuant to Supreme Court Rule 35(3), Alana Boyles has been substituted for David Dormire, who was sued in his official capacity. J.A. 55. Boyles replaced Dormire as the Director of the Division of Adult Institutions at the Department of Corrections of the State of Missouri. J.A. 882.

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OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, J.A. 854–81, is reported at 883 F.3d 1087 (8th Cir. 2018). The opinion of the Western District of Missouri, J.A. 817–32, is not reported.

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on March 6, 2018, J.A. 854, and denied Bucklew's petition for panel rehearing or rehearing en banc on March 15, 2018. J.A. 884. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Eighth Amendment of the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Missouri's death penalty statute, Mo. Rev. Stat. § 546.720.1, provides in relevant part:

> The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection. And for such purpose the director of the department of corrections is hereby authorized and directed to provide a suitable and efficient room or place, enclosed from public view, within the walls of a correctional facility of the department of corrections, and the necessary appliances for carrying into execution the death penalty by means of the administration of lethal gas or by means of the administration of lethal injection.

INTRODUCTION

This Court has long understood the Eighth Amendment to prohibit punishment that is needlessly cruel. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) ("[P]unishments of torture . . . and all others in the same line of *unnecessary cruelty*, are forbidden by that amendment to the Constitution." (emphasis added)). This case is about the procedures our legal system will employ to ensure that executions carried out by the State do not violate that fundamental commitment.

Russell Bucklew suffers from a rare and degenerative condition that makes it very likely that his execution by Missouri's lethal injection protocol will be gruesome and involve excruciating suffering. In this case, he sued not to outlaw Missouri's lethal injection method of execution, but to prevent the State from applying it to him because of the unique risks that he faces from it. This Court has not considered an as-applied method-of-execution claim on the merits since its decisions in *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion), and *Glossip v. Gross*, 135 S. Ct. 2726 (2015), set the legal standard for evaluating facial challenges to a method of execution. In rejecting Bucklew's claim, the Eighth Circuit badly misapplied the standards from those cases to circumstances for which they are ill-suited. If the Eighth Circuit's decision is allowed to stand, not only would this Court condemn Bucklew to needless suffering at the hands of the State, but it would also cripple the legal system's ability to prevent others from suffering the same fate.

First, the Eighth Circuit understood this Court's prior decisions to assume that Bucklew's execution will go as Missouri plans even when evaluating Bucklew's as-applied challenge to Missouri's method of execution. That ruling makes no sense. The heart of this claim is that Bucklew's medical condition creates

unique complications that all but guarantee his execution will not go as planned if Missouri follows its protocol. Respondents should and do know as much. The Eighth Circuit deployed its all-will-be-fine presumption to justify preventing Bucklew from taking discovery regarding the training and experience of the medical members of the execution team. They have substantial discretion in the execution chamber to make judgments that can substantially increase the suffering Bucklew experiences. The denial of discovery is inconsistent with basic fairness: because Bucklew bears the burden to establish the magnitude of risk he faces, he must be allowed to explore the medical team members' training and experience to identify and respond to his particular needs and risks. And beyond this case, such a rule bakes likely error into the litigation process, and would serve only to increase the frequency with which executions fail or result in avoidable and needless suffering.

Second, the Eighth Circuit imposed on Bucklew the burden to plead and prove a feasible and readily implemented alternative method of execution that will substantially reduce his risks. This Court developed the alternative-method requirement in response to concerns raised by the *facial* challenges to lethal injection execution protocols asserted in *Baze* and *Glossip*. Those concerns vanish in an *as-applied* challenge like Bucklew's. Nothing in Bucklew's claim suggests Missouri's lethal injection protocol cannot be applied to others; there is no risk that an as-applied claim will function as a back-door attack on the constitutionality of the death penalty. And an as-applied claim comes with a baseline—a healthy inmate—against which to compare the magnitude of the risk of suffering a medically fragile inmate faces

from a State's protocol in light of his condition. No value would be served by demanding that an inmate with a complicated medical condition custom-design his own execution.

Third, if this Court were to conclude that Bucklew must bear the burden to plead and prove an alternative method of execution, the Eighth Circuit improperly evaluated the record when it concluded that a lethal gas alternative would not substantially reduce the risks Bucklew faces. The Eighth Circuit failed both to consider the record as a whole, and to consider it in the light most favorable to Bucklew, as the summary judgment posture of the trial court's ruling required. And *finally*, the State never disputed that lethal gas is feasible and readily implemented, and there is ample reason in the record to believe that the State can develop a lethal gas protocol that would substantially reduce the risks Bucklew faces.

"The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." *Coppedge v. United States*, 369 U.S. 438, 449 (1962). That is especially true of our methods of execution. Whatever one thinks of the propriety of executions in general, all can agree that identifying predictable cruelty in carrying out the death penalty and taking appropriate steps to avoid it is a basic commitment of a civilized society. The "basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion). By reversing the Eighth Circuit's decision, and establishing appropriate procedures and standards for as-applied method-of-execution claims, this Court will better equip our judicial system to protect the basic human dignity not only of inmates like Bucklew, but also of state officials and of society

itself, neither of which have any interest in inflicting cruel punishments on inmates.

STATEMENT OF THE CASE

In 1998, Bucklew was convicted of first degree murder, kidnapping, burglary, forcible rape, and armed criminal action. He was sentenced to death. He does not challenge the validity of his conviction or death sentence.

A. Bucklew's Rare Medical Condition

Bucklew suffers from an exceedingly rare, progressive, and incurable medical condition—cavernous hemangioma—that causes inoperable, blood-filled tumors to grow in his throat and around his face, head, and neck. J.A. 857, 819–20, 220, 328, 648–49. Cavernous hemangiomas occur in only .2% of the general population, and cavernous hemangiomas in the oral cavity (affecting the lips, tongue, and palate) are prevalent in less than 1% of those who have cavernous hemangioma (only .002% of the general population). Minhua Wang et al., *Cavernous Hemangioma of the Uvula: Report a Rare Case with Literature Review*, 8 N. Am. J. of Med. & Sci. 56 (2015). A case like Bucklew's, involving the uvula, is "extremely rare." *Id.* at 56.

Bucklew's tumors are extremely sensitive and susceptible to rupture. J.A. 857. Merely touching his airway can cause his airway and uvula to leak blood. J.A. 225–26, 228–29. Indeed, the minor friction caused by activities as routine and seemingly innocuous as snoring and eating chips has caused the delicate tissue of Bucklew's airway and uvula to tear, causing Bucklew's tumors to bleed. Bucklew's treating physician deemed the risk of bleeding great enough to warrant giving Bucklew biohazard bags and gauze to

keep in his cell so that he may self-treat hemorrhages. J.A. 225–26; APP0466, 469.[1]

Bucklew's condition is progressive. As his tumors continue to grow, his risk of experiencing a catastrophic hemorrhage increases. J.A. 229, 647–48; APP0328. As of April 12, 2012, Bucklew was at a low risk of life-threatening hemorrhage. J.A. 644–45. But over the ensuing months, his treating physician observed that his hemangioma had grown, J.A. 647–48, and by January 2017, Bucklew's medical expert, Dr. Zivot, determined that his condition had significantly progressed to the point that his tumors posed an imminent risk of life-threatening hemorrhage, *see* J.A. 229.

Bucklew's "grossly enlarged uvula" partially obstructs his airway, making it difficult for him to breathe and causing him to choke and bleed. J.A. 226–27. Indeed, when Bucklew was put under general anesthesia during previous surgeries, he underwent a tracheotomy to ensure that his airway would remain secure during the procedures. J.A. 221, 224. Because of his grossly enlarged uvula, Bucklew's difficulty breathing is exacerbated when he lies supine. When lying supine, gravity pulls his enlarged uvula into the back of his throat, effectively blocking his airway. To prevent suffocation, he must consciously monitor and mechanically adjust his breathing to shift his uvula and permit airflow. So Bucklew sleeps on his right side and elevated by pillows at a 45-degree incline to avoid choking and hemorrhaging, and yet still experiences hemorrhages severe enough that he typically begins each morning by cleaning the blood off his face that

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[1] APP citations are from the Appendix to Brief, *Bucklew v. Lombardi*, No. 14-3052 (8th Cir. filed Dec. 1, 2017).

has leaked from his nose and mouth while he slept. J.A. 226–27.

Bucklew also has compromised peripheral veins in his hands and arms, which make his veins difficult to visualize. J.A. 857. Even after multiple attempts, setting an IV in Bucklew's arms would likely be extremely difficult if not impossible. J.A. 231; *see also* J.A. 332.[2]

B. Missouri's Execution Procedure

Missouri law authorizes execution by both lethal gas and lethal injection. Mo. Rev. Stat. § 546.720. Missouri has a written execution procedure for lethal injection only; it has none for lethal gas. Nonetheless, respondents have conceded that lethal gas is a feasible and readily implemented alternative to lethal injection in Missouri. J.A. 866.

The execution team. — The medical technicians responsible for the execution, who have been designated "M2" and "M3" to preserve their anonymity, have substantial discretion in the execution chamber. J.A. 595. They will not have examined or even met Bucklew before the execution. All they will know about Bucklew they will have learned from a single-page form. This form is not a complete medical record and is prepared by a

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[2] During the preparation of this brief, Bucklew suffered a life-threatening bout of bacterial meningitis. Bucklew was hospitalized for nearly two weeks. His airway collapsed, which caused him to be placed on a ventilator. Before his release from the hospital, Bucklew underwent a tracheotomy. The most recent information provided to counsel is that Bucklew's tracheostomy tube is still in place. Though Bucklew's most recent medical records are not part of the record on appeal, at the Court's request, counsel would provide to the Court any medical records it wishes to review.

Department of Corrections official, *not* the inmate's treating physician. J.A. 523–24; *see also* McKinney Dep. 20:12–20, 59:18–60:19 (noting that the form "is not a complete medical record" but instead a "summary" that is "not prepared by medical").[3]

At most, the one-page summary will indicate that further inquiry into Bucklew's history and condition is warranted, *see* McKinney Dep. 20:12–20, 59:18–60:19, but no such inquiry will be pursued. Indeed, the medical team will not be provided with any other medical records, including the MRI images that reveal the size of the tumors in Bucklew's airway, J.A. 528, and the team will not be able to consult with Bucklew's treating physician. J.A. 635–36.

Obtaining venous access. — The execution protocol gives the medical team substantial discretion to choose where to place IV lines to inject the lethal drug. The protocol authorizes accessing the vein via a central line, such as the femoral vein, but only if the medical personnel involved in the execution "have appropriate training, education, and experience for that procedure." J.A. 214. Not all state medical personnel, and indeed not all anesthesiologists, are qualified or skilled at performing a central line procedure, however. J.A. 336, 462.

In the past, after failing to gain peripheral vein access, medical members of the execution team have employed an outdated procedure known as a "cut-down" in the leg. J.A. 615–16. A cut-down involves slicing into the leg to visualize the vein; it is extremely painful. *See* J.A. 345. Sealed, sanitary packets with all of the instruments required for this procedure are available to the execution team. J.A. 616–18. Both Dr.

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[3] No. 4:14-cv-8000 (W.D. Mo. filed Apr. 10, 2017) (ECF 182-14) (*see* J.A. 9).

Zivot, Bucklew's medical expert, and Dr. Antognini, respondents' medical expert, agree that a "cut-down" is not the current preferred method of establishing central line access. J.A. 184, 350.

Positioning Bucklew during execution. — In all prior lethal injection executions performed under Missouri's current execution protocol, the inmate has been supine. J.A. 521, 544, 612. Based on this experience, there is every reason to expect that Bucklew will have to lie supine for a substantial period of time. Moreover, even outside the execution context, the record suggests that patients are often required to lie supine during a cut-down procedure. *See* J.A. 346. And, of course, Bucklew will be strapped to a gurney.

The summary judgment record lacks any evidence suggesting that respondents planned to position Bucklew any differently than other inmates. In response to Bucklew's petition for rehearing and motion for stay of execution before the court of appeals, however, respondents submitted a new affidavit from Alana Boyles to address this issue. Ms. Boyles—who was never previously identified by respondents and thus never deposed in the district court—asserted that "the Department will adjust the gurney so that Mr. Bucklew is not lying fully supine at the time the Department administers the lethal chemicals." J.A. 882. There is good reason to doubt that Ms. Boyles actually knows or has the authority to dictate how Bucklew will be positioned on the gurney in the execution chamber. Ms. Precythe, Ms. Boyles' superior, testified that she had no intention of modifying the execution protocol, J.A. 576, and that she would rely upon the execution team—understood to include the core team of individuals in the execution chamber—to make judgments as to how to handle Bucklew's unique medical condition. *See* J.A. 599–600.

Regardless, Ms. Boyles asserts only that Bucklew would not be "fully" supine "at the time the Department administers the lethal chemicals"—which is entirely consistent with forcing Bucklew to lie fully supine for the prolonged period of time *prior to* administration of the lethal chemicals.

Administration of lethal drug. — After the medical team gains venous access, a non-medical member of the execution team will inject the lethal drug. J.A. 214. Death does not follow immediately. After a "sufficient amount of time for death to occur," medical personnel will examine Bucklew to determine whether he is still breathing. If he is still breathing, a second round of chemicals will be administered. J.A. 215. If, after the second round of chemicals "the appropriate medical personnel cannot confirm that death has occurred," medical personnel will be directed to wait an "appropriate amount of time" to reevaluate Bucklew. *Id.* Death is expected after several minutes. J.A. 306, 526; *see also* J.A. 214–15.

C. The Known Risks Bucklew Faces From Lethal Injection In Missouri

Bucklew's execution will not go smoothly. He faces identifiable severe risks from the procedure both *before* and *after* the medical team gains venous access and the non-medical team begins to administer the lethal drug. It is undisputed that Bucklew will experience pain and suffering under Missouri's lethal injection protocol—the only questions are (1) for how long and (2) whether the State's imposition of prolonged suffering qualifies as cruel and unusual punishment. J.A. 470–72, 194–95, 197–99, 233–34.

1. Complications are likely to arise from the very beginning. Attempts to access Bucklew's peripheral veins will very likely fail, J.A. 231–32, but not before

medical personnel jab needles into Bucklew's arms. *See id.*; J.A. 183, 186–87, 350–51. These repeated failed efforts to gain venous access will increase Bucklew's pain and discomfort, resulting in physical manifestations of distress, including an increase in blood pressure and rate of breathing, which, in turn, is likely to cause his tumor to rupture. J.A. 183, 186–87, 232, 234–35, 351. Bleeding from the tumor in his throat will, of course, create further difficulties breathing. J.A. 234–35. And this is true regardless of whether Bucklew is lying flat or sitting upright while the technicians poke at his peripheral veins in an attempt to establish an IV line for the lethal drugs. Even while seated, Bucklew will likely start gagging on his own blood before the technicians achieve IV access. *See* J.A. 204, 234–35.

In the unlikely event that the medical team establishes peripheral vein access, Bucklew is at an increased risk of having a vein blow because he has poor peripheral veins. J.A. 340–41, 189–90. If a vein blows, pentobarbital would leak into and destroy the surrounding tissue, causing extreme pain. J.A. 332–33.

Far more likely, the medical team will eventually stop trying to gain peripheral access, and will turn to a central line, likely the femoral vein. To access the femoral vein, the record indicates that members of the execution team will perform a cut-down procedure; that is what they have done in the past when attempts at peripheral access failed. J.A. 611–12, 616. During a cut-down, Bucklew will lie flat, at least while the medical team attempts to access his femoral vein, and possibly throughout the remainder of the execution. J.A. 821, 875–76 & n.5. The gagging he is experiencing from bleeding will likely become worse as he struggles to position his tumor to prevent an airway blockage.

He will convulse in an effort to breathe. J.A. 232–35. His convulsions will increase the risks associated with the attempt to gain access through the femoral vein, including piercing the femoral artery. J.A. 343–45; *see also* J.A. 235. That risk was recently made especially vivid during the failed execution of Doyle Lee Hamm in Alabama on February 22, 2018. Even though Alabama certified that it would use personnel qualified to access the femoral vein, the medical team punctured Hamm's artery. Preliminary Report of Doyle Hamm Examination at 4, *Hamm v. Dunn*, No. 2:17-cv-2083 (N.D. Ala. filed Mar. 5, 2018) (ECF 93). That execution had to be abandoned. If, as is likely, Bucklew is violently struggling to breathe while the team attempts femoral access, his risk of a similar failure increases.

The painful cut-down procedure and struggles to breathe will further increase the stress of the execution and the likelihood and severity of a rupture to Bucklew's tumor. There is a significant likelihood that Bucklew will be choking on his tumor and gagging on his own blood for the duration of the cut-down procedure, before the injection of the lethal drug even begins. J.A. 232–35, 351.

2. After the lethal drug begins to flow, Bucklew will soon lose the ability to manage his airway. This is true regardless of his position—whether lying flat, upright, or anything in between. J.A. 233. He will begin to experience a sense of suffocation and the extreme pain associated with suffocation. J.A. 819–22. In the unlikely event he has not already begun choking on his own blood as a result of struggling while lying flat throughout the cut-down procedure, the violence of his choking as he slips into unconsciousness will likely cause his tumors to rupture and lead him to aspirate his own blood. J.A. 234–35. Bucklew's hemangiomas

may also cause blood to come out of his facial orifices during the execution process. J.A. 445–46.

The parties disagree over how long Bucklew will be unable to manage his airway while experiencing the sense of suffocation. Bucklew's expert opines that Bucklew could be in this state for between 52 and 240 seconds, while respondents' expert opines that he would be conscious of suffocation for 20 to 30 seconds. J.A. 821–22. These estimates are on top of any period of time Bucklew is gagging and struggling to breathe prior to the administration of the lethal drug.

Missouri has never executed an inmate who suffers from cavernous hemangioma. APP0448 at Resp. No. 4. And prison officials have no contingency plans in place should any aspect of the execution fail to go as planned.

D. The Medical Team

Any judgments concerning how to handle an inability to gain venous access, an inmate choking, gagging, or hemorrhaging blood, or any of the other predictable complications arising from Bucklew's condition are left to the sole discretion of the medical members of the execution team. J.A. 548–50, 588–89. Nothing in the record suggests they will be anticipating what Bucklew will likely experience.

As noted above, the medical personnel who perform the execution will not be provided any information concerning Bucklew's medical condition beyond the pre-execution summary of medical history, which is a single page. In 2014, as Missouri prepared to execute Bucklew, the non-physician who prepared the form provided little information to educate the medical team. *See* J.A. 682–84. As relevant here, it reported Bucklew's cavernous hemangioma, but only with respect to his jaw and upper lip. It said *nothing* about

his compromised veins, and *nothing* about the tumor in his throat that will inhibit his breathing during the execution and will very likely rupture and cause him to choke on his blood, and *nothing* about his being prone to bleeding. Indeed, whoever prepared the form inaccurately reported "No" in response to the question "Does the offender have Asthma, bronchitis, or *any other breathing problems?*" J.A. 683 (emphasis added). Dr. McKinney—Bucklew's treating physician at the Department of Corrections—testified that he was never contacted about Bucklew's medical history prior to Bucklew's scheduled execution in 2014, nor was he asked to help fill out any form. J.A. 635–36. Missouri's process all but ensures that the medical team will be largely ignorant of Bucklew's needs and the unique risks he faces.

Moreover, the process prevents the medical team from acquiring any medical information about Bucklew on their own, even if they want to. As discussed above, they will have access to none of Bucklew's medical records. And they cannot consult with an inmate's treating physicians regarding any atypical or unique medical conditions the inmate may have. J.A. 635–36. There is no reason to believe that the medical members of the execution team have ever seen *any* patient with cavernous hemangioma, or have ever seen one with tumors in his throat. Even if they are alerted to the *fact* of the disease by the medical form, there is no reason to believe they will be alert to the rare tumor in Bucklew's throat, its exceptional sensitivity, and the special suffocation risk it creates.

In sum, the medical members of the execution team have all the authority to make decisions affecting both the magnitude of Bucklew's risks and any responses to problems as they arise. But the process ensures they are almost entirely ignorant of his condition. There is

no reason to believe they have seen anyone like Bucklew before, and no reason to believe they are equipped either as a matter of training or experience-based judgment to handle problems as they arise. Yet their on-the-spot judgments will have an enormous impact on the degree of suffering Bucklew endures.

E. The Lethal Gas Alternative

Bucklew has proposed death by nitrogen hypoxia as an alternative method of execution. J.A. 42–44. Lethal gas is an authorized method of execution under Missouri Law. Mo. Rev. Stat. § 546.720. In addition, two other States—Louisiana and Oklahoma—have extensively investigated the feasibility and availability of lethal gas. APP1069; APP0546-67; J.A. 734–37. Oklahoma's legislature determined that "[t]he costs would be minimal and include the one time purchase of a gas mask (similar to what one experiences at the dentist), and the price for a canister of nitrogen." J.A. 693. An Oklahoma multicounty Grand Jury, convened in October 2015 to review evidence and issue a report after the botched execution of Charles Warner, also concluded that given the abundance of nitrogen gas, it would be easy and inexpensive to obtain. J.A. 695–97. Evidence also suggests that nitrogen-induced hypoxia would be an easy method of execution to administer, and would not require the participation of licensed medical professionals. *Id.* Lethal gas requires no venous access at all. As both the district court and court of appeals recognized, respondents have not contested that nitrogen-induced hypoxia is both a feasible and available alternative method of execution. J.A. 827, 866.

Dr. Antognini opined that, if administered correctly, lethal gas would lead to a quick death. J.A. 460. Specifically, he testified that inhalation of nitrogen gas

would "quickly achieve hypoxia" and cause an inmate to become unconscious "very quickly"—within about 20 to 30 seconds of breathing pure nitrogen. J.A. 432, 458, 460; *see also* J.A. 877. Dr. Zivot did not opine on whether lethal gas would result in significantly less suffering than Missouri's lethal injection protocol because he is ethically barred from proposing a method of execution at all. J.A. 219–220.

In addition, there is reason to believe that breathing 100% nitrogen does not produce a sense of suffocation. The sense of suffocation is caused by a buildup of carbon dioxide in the blood when a person is unable to expel air. J.A. 736. If one breathes in pure nitrogen while expelling air, death is caused by an absence of oxygen unaccompanied by a sense of suffocation. *Id.*; J.A. 746–47. Reports of high altitude pilots who lost consciousness while breathing air low in oxygen and high in nitrogen is consistent with this view. J.A. 696–97.

F. Proceedings Below

1. Procedural History And Discovery

In a Fourth Amended Complaint filed on October 13, 2015, Bucklew challenged the constitutionality of Missouri's execution protocol as applied to him. Among other things, he alleged that Missouri's lethal injection protocol "presents a substantial risk of causing excruciating or tortuous pain and inflicting needless suffering" and therefore violates the Eighth Amendment's prohibition on cruel and unusual punishment.[4] J.A. 85–86 ¶¶ 148, 151.

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[4] Bucklew was also party to an earlier case styled *Zink v. Lombardi*, No. 12-4209-BP (W.D. Mo. filed Aug. 1, 2012), in which he and other inmates raised a facial challenge to Missouri's lethal injection execution protocol.

Bucklew's initial complaint was filed on May 9, 2014, and on May 14, 2014, Bucklew moved for a stay of his execution, then scheduled for May 21, 2014, to provide adequate time to litigate his claims. The district court denied Bucklew's motion for a stay, and dismissed his complaint, *sua sponte*. *Bucklew v. Lombardi*, No. 14-8000-CV-W-BP, 2014 WL 2736014 (W.D. Mo. May 9, 2014).

With only two days remaining until his scheduled execution, Bucklew immediately appealed the dismissal of his complaint. An Eighth Circuit panel granted a stay. *Bucklew v. Lombardi*, 565 F. App'x 562, 569–72 (8th Cir. 2014). After the Eighth Circuit, sitting *en banc*, vacated the stay on the same day, this Court entered a stay of execution pending Bucklew's appeal. *Bucklew v. Lombardi*, 134 S. Ct. 2333 (2014) (Mem.).

Roughly ten months later, the *en banc* Eighth Circuit reversed the dismissal of Bucklew's complaint and remanded for further proceedings. *Bucklew v. Lombardi*, 783 F.3d 1120 (8th Cir. 2015). The full Eighth Circuit rejected Bucklew's argument that he need not propose an alternative method of execution because he raised an as-applied, not a facial, challenge to Missouri's lethal injection method of execution. *Id.* at 1123, 1128.

On remand, Bucklew amended his complaint to assert that lethal gas is a "feasible and available alternative method that will significantly reduce the risk of severe pain." J.A. 85 ¶ 150. He also sought discovery that would establish precisely how the execution procedure would be applied to him. In light of the Eighth Circuit's remand, Bucklew bore the burden of demonstrating that his proposed alternative method of execution would significantly reduce the risk of suffering that he faced from lethal injection.

Glossip, 135 S. Ct. at 2737. The first step in comparing the two methods, as Bucklew saw it, was determining the severity of the risks he faces from Missouri's lethal injection procedure.

To that end, Bucklew sought discovery about the medical members of the execution team who would be responsible for implementing the execution protocol. In light of "the severity of his medical condition," Bucklew told the district court that "the training and qualifications of the execution team members are especially important." APP0222. Bucklew sought, among other things, information about the skills and training of M2 and M3 to handle the predictable risks that his rare condition would present. APP0224–26. Bucklew indicated that identifying information in any documents produced concerning M2 and M3 could be redacted to ensure their anonymity. APP0224–25. Bucklew also sought to depose the medical members of the execution team. APP0226. Bucklew explained that without such discovery he would "not know the current composition of the execution team, the type of equipment presently being used or whether any monitors for blood pressure, heart rate or oxygen are available in the execution chamber." APP0222.

Respondents sought phased discovery. Specifically, respondents argued that Bucklew should be permitted to discover only information about lethal injection generally, without any specifics related to Missouri's execution protocol or the medical professionals tasked with implementing the protocol. APP0234-37. Instead, respondents were insisting that Bucklew prove lethal gas would significantly reduce his risk of suffering while opposing discovery that would help establish how severe a risk he faced from lethal injection.

The district court rejected the bulk of Bucklew's requests for discovery. J.A. 116–26. The district court

agreed with respondents that "detailed discovery about the execution team members is unnecessary to resolving the issues in this case," J.A. 124, and it permitted Bucklew discovery only of information regarding the number of doctors, nurses, or anesthesiologists on the execution team. *Id.* Bucklew received no information pertaining to those individuals' actual expertise and skills relevant to carrying out the execution of an individual with Bucklew's severe and unusual medical condition. *Id.* And Bucklew was denied the opportunity to depose any of the professionals who would administer his execution. J.A. 124–25.

After discovery had proceeded further, Bucklew explained in a motion to compel that "throughout discovery, the training of the medical members of the execution team has squarely been placed at issue, particularly as it relates to Mr. Bucklew's as-applied challenge." APP1010. Testimony from prison officials had revealed the discretionary authority granted to the medical members of the execution team. Discovery had also revealed the previously unknown use of a cut-down procedure to obtain venous access to the femoral vein, equivocal testimony regarding the feasibility of repositioning the gurney, and testimony indicating that not all medical professionals are qualified or sufficiently skilled to perform a central line procedure. APP1016-20. Bucklew urged that, without information regarding the training and expertise of the medical professionals on the execution team, he could not know how the medical professionals would exercise their discretion or what types of procedures they are qualified to perform, nor could he know how they would address any of the contingencies likely to arise during his execution. *Id.* In short, without discovery about M2 and M3, Bucklew could not know how the

execution protocol would actually be applied to him. The district court again denied Bucklew access to this discovery. J.A. 665–66, 681.

M2 and M3 have been deposed in prior capital litigation, specifically in 2010 in *Ringo v. Lombardi*, No. 09-4095-BP (W.D. Mo. filed May 17, 2009), and in 2013 and 2014 in *Zink v. Lombardi*, No. 12-4209-BP (W.D. Mo. filed Aug. 1, 2012). Bucklew's appointed counsel, Ms. Pilate, represented Bucklew in those proceedings (which raised facial challenges, not as-applied challenges to Missouri's execution protocol), and has reviewed those sealed depositions. But pro bono counsel, Sidley Austin, who joined Bucklew's team later, has been barred from reviewing the depositions, and the court refused to allow the depositions to be used in Bucklew's case. APP1019. In connection with Bucklew's motion to compel discovery, Ms. Pilate sought leave to file an exhibit under seal, and *ex parte* as to Sidley Austin only, that contained excerpts of M3's prior testimony. J.A. 127–30. That request was denied. J.A. 131. Ms. Pilate also requested permission to file a supplemental brief regarding the prior testimony of M2 and M3 in support of Bucklew's opposition to summary judgment, contending that she had reason to believe that the contents of those depositions contravened portions of the respondents' statement of allegedly undisputed facts and also provided additional facts relevant to summary judgment issues. J.A. 811–15. That request was denied. J.A. 816. The district court also again denied Ms. Pilate's request to share the contents of the M2 and M3 deposition transcripts with Sidley Austin in connection with Bucklew's Rule 59(e) motion. J.A. 833–35.

2. The Lower Court Decisions

The district court granted respondents summary judgment. The district court assumed that the record demonstrated "a substantial risk that [Bucklew] will experience choking and an inability to breathe for up to four minutes." J.A. 827. The court also noted that "Defendants do not argue that [Bucklew's proposed alternative] method of execution is not feasible or readily implemented." *Id.* However, the district court concluded that the record did not present a triable dispute concerning whether execution by nitrogen gas would significantly reduce Bucklew's risk of needless suffering, as compared to Missouri's lethal injection protocol. J.A. 828.

A divided panel of the Eighth Circuit affirmed. The panel majority concluded that Bucklew provided no evidence proving that lethal gas would substantially reduce his risk of severe pain. It acknowledged evidence from Bucklew's expert that lethal injection would cause him to experience a sense of suffocation for several minutes. J.A. 867–68. The panel also acknowledged that it was undisputed that lethal gas would cause him to experience a sense of suffocation for, at most, 20–30 seconds. *Id.* And nothing in the panel's opinion cast doubt on the proposition that that difference—between suffocation for 20–30 seconds and suffocation for several minutes—would be significant enough to warrant relief. Instead, the panel declared that Bucklew's claim failed because the evidence showing a difference between the two methods had not come from a *single* witness. *Id.* That is, the panel interpreted this Court's requirement in *Glossip* of "comparative" evidence to mean that an inmate must present one witness who presents testimony regarding all aspects of the comparison. *Id.*

Judge Colloton dissented. In surveying the evidence and interpreting it in the light most favorable to Bucklew, Judge Colloton concluded: "If the factfinder accepted Dr. Zivot's testimony as to the effect of pentobarbital, and Dr. Antognini's uncontroverted testimony as to the effect of nitrogen gas, then Bucklew's proposed alternative method would significantly reduce the substantial risk of severe pain . . . ." J.A. 877. Judge Colloton observed that the general rule allows the trier of fact to accept all or just a part of any witness' testimony, and that on summary judgment one party can rely on a portion of the opposing party's expert's testimony to create a genuine issue of material fact. *Id.* Accordingly, Judge Colloton would have remanded the case to the district court to hold a trial and make factual findings.

The panel majority also affirmed the district court's denial of any discovery into the qualifications of the medical team. The panel majority, interpreting Bucklew's argument as resting on the "premise that M2 and M3 may not be qualified for the positions for which they have been hired," refused to "assume that Missouri employs personnel who are incompetent or unqualified" or to permit discovery into "[t]he potentiality that something may go wrong in an execution." J.A. 870–71. Instead, the panel majority insisted that the court's analysis must be based on the assumption "that those responsible for carrying out the sentence are competent and qualified to do so, and that the procedure will go as intended." J.A. 871.

The Eighth Circuit ruled just two weeks before Bucklew's scheduled execution. Three days after the decision, Bucklew petitioned for a panel rehearing or rehearing *en banc*, and moved for an emergency stay. With five days left before his scheduled execution, the Eighth Circuit denied the petition. J.A. 884. This

Court thereafter stayed Bucklew's execution and granted Bucklew's petition for writ of certiorari.

SUMMARY OF ARGUMENT

Bucklew has a rare medical condition. If he were executed by Missouri's lethal injection protocol, the result would be a gruesome and predictably excruciating death. The State's decision to adhere to its protocol notwithstanding the known and substantial risk of gratuitous suffering that it would impose violates the Eighth Amendment's prohibition on cruel and unusual punishments, and the contrary decision of the court of appeals should be reversed for three independent reasons.

First, the Eighth Circuit's decision rests on an erroneous and improper assumption. In the face of substantial evidence that Bucklew's medical condition will lead to unique problems in the implementation of the protocol, the court of appeals simply assumed those problems away—it assumed, in other words, that the execution will go as intended. That assumption not only improperly resolved disputed factual questions in the State's favor; it also provided the Eighth Circuit's only justification for denying Bucklew crucial discovery. Stripped of its erroneous assumption, the decision below cannot stand.

Second, the Eighth Circuit wrongly imported the "known-and-available-alternatives requirement" that was developed for facial challenges to methods of execution into a case involving an as-applied challenge. The known-and-available-alternatives requirement serves two purposes in the context of facial challenges, and neither of those purposes are implicated here. Unlike a facial challenge, Bucklew's claim based on his unique medical condition does not risk creating an effective moratorium on capital

punishment. And unlike a facial challenge—in which the inherent cruelty of one method of execution cannot reasonably be evaluated without a comparator—Bucklew's claim provides a ready basis for evaluating the cruelty of the State's intended method of execution as applied to him. What makes the State's intended course of action cruel is that the State intends to proceed with a method that, based on Bucklew's unique medical condition, it knows presents a very serious risk of gruesome pain and suffering.

Finally, even if Bucklew were required to identify a known and available alternative that would reduce his risk of pain, the record as a whole amply supports the conclusion that lethal gas is such an alternative. Indeed, the State did not even dispute the availability or feasibility of a lethal gas alternative below. The only factual dispute concerned whether this known alternative would reduce Bucklew's risk of suffering. And based on the testimony of the experts—both Bucklew's expert's testimony on lethal injection and the respondents' expert's testimony on lethal gas—a reasonable finder of fact could conclude that the lethal gas alternative would indeed substantially reduce that risk. But the Eighth Circuit refused to look at the record as a whole. Instead, it imposed a novel rule that a claimant cannot prevail unless all elements of his claim are established through the testimony of a single expert witness. This single-witness rule is wrong in general and especially perverse in method-of-execution cases, where inmates will typically be unable to find an expert willing and able, consistent with ethical constraints, to tell the State how best to kill an inmate.

The decision below should be reversed.

ARGUMENT

I. COURTS SHOULD NOT ASSUME THAT AN EXECUTION WILL GO AS INTENDED WHEN CONSIDERING AN AS-APPLIED CHALLENGE TO A METHOD OF EXECUTION.

Bucklew's as-applied challenge to Missouri's method of execution is based on the risks associated with his unique medical condition. He contends that that condition—particularly when combined with the inadequate medical history and practices of the medical members of the execution team—makes it very likely that his execution will involve avoidable, intense pain and suffering. In short, the execution will not go as intended. Yet in evaluating his claim, the court of appeals held that it must "*assum[e]* that those responsible for carrying out the sentence are competent and qualified to do so, and that the procedure *will* go as intended." J.A. 871 (emphasis added). Having assumed the very conclusion respondents urged the court of appeals to reach, the majority erroneously rejected Bucklew's claim, along with his request for discovery.

A. A Court Presented With An As-Applied Method Of Execution Claim Must Consider The Objectively Known Risks That Arise From How An Execution Protocol Will Impact An Inmate With A Particular Medical Condition.

The Eighth Circuit's assumption that Bucklew's execution will go as intended is improper for at least two reasons. First, it effectively converts as-applied method-of-execution challenges into facial attacks on a State's execution protocol: an inmate with a unique medical condition can only obtain relief from

predictable cruelty if he can prove that a protocol would impose similar suffering on all inmates—*i.e.*, that the suffering will obtain if the execution goes as intended. Second, it obscures a long-recognized category of unconstitutional treatment of prisoners: the deliberate indifference to an inmate's medical condition.

1. *Baze* and *Glossip* confirm that the Eighth Amendment protects inmates from methods of execution that pose "a substantial risk of serious harm." *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 50). To obtain relief, an inmate must show that the risk of harm is "objectively intolerable," because such a risk "prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* The plurality in *Baze* thus contrasted an innocent mistake with a predictable failure, the latter of which is illustrated by *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (plurality opinion). *Resweber* teaches that an "unforeseeable accident," such as a mechanical failure in the operation of the electric chair, would not make a second attempt at execution by electrocution unconstitutional, but a "'hypothetical situation' involving 'a series of abortive attempts at electrocution' would present a different case." *Baze*, 553 U.S. at 50 (quoting *Resweber*, 329 U.S. at 471 (Frankfurter, J., concurring)). Predictable suffering presents a serious Eighth Amendment problem.

But *Baze* and *Glossip* required the Court to abstract from the particular circumstances of the individual claimants to identify the risks—or lack of risks—inherent in an execution protocol. *Baze* and *Glossip* were facial challenges: the inmates did not suggest that they were uniquely exposed to a risk of suffering. Instead, they argued that the relevant protocols were

inherently problematic, as applied to them or anyone else. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge . . . must establish that no set of circumstances exists under which the Act would be valid"); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (to succeed on a facial challenge, the plaintiff must show "that the law is unconstitutional in all of its applications"). Thus, in *Baze*, this Court considered the generally applicable risks posed by improper mixing of chemicals, as well as failures of IV administration and of procedures for monitoring consciousness. 553 U.S. at 54–56 (plurality opinion). Likewise, in *Glossip*, this Court evaluated how midazolam would affect "any individual" at the dose Oklahoma's execution protocol required. *Glossip*, 135 S. Ct. at 2741. When evaluating a facial challenge to a State's protocol, it is only natural to assume away differences among inmates that may uniquely expose some inmates to unintended (albeit predictable) problems in implementation—even problems that may result in intense suffering.

Assuming away predictable but unintended problems in implementation makes no sense in the context of an as-applied challenge like Bucklew's. Bucklew places front and center the risks raised by the interaction of Missouri's execution protocol and the particular circumstances of his medical condition. The risk he faces cannot be understood without taking into consideration how someone with compromised veins and cavernous hemangioma, including a highly sensitive tumor on his uvula, will suffer during the various steps Missouri's protocol contemplates, as implemented by the medical personnel involved. Those risks can be objectively evaluated in advance. For example, the medical personnel who have substantial discretion over Missouri's execution procedure, *see*,

e.g., J.A. 583–85, 587–89, 595–96, can be either well or poorly prepared to exercise their judgment in the execution chamber in light of Bucklew's known risks. A medical team that is poorly informed of Bucklew's condition or unfamiliar with cavernous hemangioma will substantially increase the objectively knowable risk of suffering that Bucklew faces.

Bucklew submits that—even on the existing record—a reasonable finder of fact would conclude that he faces a substantial risk of serious harm in the implementation of Missouri's lethal injection. The State's view is that no such risk exists, and the execution will go as intended. The court of appeals erroneously resolved this factual dispute by assuming it away. But a rule that assumes executions will go as intended converts as-applied method-of-execution claims into facial challenges: inmates facing a unique and predictable risk of a botched execution can only obtain relief if they can prove that the protocol is cruel on its face when all goes as planned.

2. The Eighth Circuit's erroneous assumption also obscures a kind of cruelty that has been a focus of this Court's Eighth Amendment jurisprudence for decades. This Court has long understood that "deliberate indifference" to an inmate's medical condition can rise to the level of cruel and unusual punishment within the meaning of the Eighth Amendment, because it "constitutes the 'unnecessary and wanton infliction of pain,'" contrary to contemporary standards of decency. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). There is no reason to cast this principle aside in the methods-of-execution context: if state officials know that an inmate suffers from a rare medical condition that makes him uniquely likely to endure gratuitous

suffering if they follow ordinary execution protocols, their decision to go forward is culpably cruel.[5]

To ask medical personnel to carry out an execution when they have not been alerted to the serious medical condition of the inmate, and have no training or experience dealing with that condition, is to invite catastrophe. When such an execution predictably goes very badly, it would be no "innocent" mistake in the carrying out of an execution that does not "suggest cruelty." *Baze*, 553 U.S. at 50 (plurality opinion). Such a predictably botched execution denies not only respect for the basic human dignity of the condemned inmate by showing indifference to his likely suffering. It also denies the essential human dignity of those charged with carrying out an execution by making them an unwitting party to foreseeable cruelty. The Eighth Amendment demands more for the benefit of inmate and executioner alike.

By assuming that executions will go *as intended*, the court of appeals in effect absolves respondents of their decision to take an unjustified risk. Even if the inmate's unique medical condition makes it very likely that the execution will be torturous, the Eighth Circuit's rule erroneously leaves state officials free to

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[5] Bucklew's operative complaint included a separate "deliberate indifference" claim, which was dismissed early in the litigation. J.A. 86–88 ¶¶ 152-59 (Count II); APP0216 (Order granting dismissal of Count II)). But that dismissal does not foreclose consideration of underlying principles regarding the imposition of gratuitous suffering in connection with Bucklew's method-of-execution challenge. Nor does such dismissal restrict the discovery to which Bucklew should be entitled. *Contra* J.A. 124–25. For example, M2's and M3's training and qualifications will have a direct impact on the level of risk Bucklew will face during an execution, regardless of whether Bucklew's claim is viewed through the lens of *Glossip*/*Baze* or *Estelle*.

ignore that risk so long as the execution would be humane if all goes as intended.

B. An Inmate Asserting An As-Applied Challenge Is Entitled To Discovery Into The Training And Experience Of Medical Members Of The Execution Team To Establish The Full Extent Of The Risk Of Suffering He Faces.

Bucklew sought discovery into the training and qualifications of the medical personnel on the execution team so that he could establish the full extent of the risks of suffering he faces from Missouri's execution procedure. But the Eighth Circuit affirmed the district court's decision to preclude all such discovery. It did so because it felt obligated to assume that the execution will go as intended. J.A. 871. Having *assumed* the execution will go as intended, the court of appeals saw no need for discovery into the medical personnel's training or qualifications. In the absence of that erroneous assumption, no sound principle of execution protocol administration supports depriving an inmate of the opportunity to ensure that the medical members of the execution team are informed about the details of his complicating medical condition, and are equipped to manage it so that the inmate does not needlessly suffer.

As discussed above, Bucklew produced ample evidence that Missouri's execution protocol, as applied to him, involves a substantial risk that he will suffer repeated, failed attempts to gain peripheral venous access, that the tumor on his uvula will rupture early in the process, that he will gag on his own blood as a result, that when he is made to lie flat during a cut-down procedure he will have difficulty managing his airway, and that (assuming the execution progresses

this far) when the lethal drug is administered he will, after he loses the ability to manage his airway, experience a sense of suffocating for several minutes. *See supra* pp. 10–13. He has also produced evidence that medical members of the execution team will not know about these risks because they will be ill-informed about his condition. *See supra* pp. 7–8; 13–15. Critically, however, what he does not know is how the execution team is likely to respond as these problems arise and as his suffering increases. He is entitled to discovery to test the experience, knowledge, and training of the medical team whose decisions will have such a dramatic impact on the risk of suffering he faces.

Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering," among other things, "the importance of the issues at stake in the action, . . . the parties' relative access to relevant information, . . . [and] the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(1). As this Court has explained, relevance is to be "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). "[D]iscovery is not limited to issues raised by the pleadings, . . . [n]or is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits." *Id.* The material and depositions that Bucklew sought related to the experience, knowledge,

and training of M2 and M3 is squarely relevant to Bucklew's claim for several reasons.

First, much of the protocol's implementation will be at the medical team members' discretion. Anne Precythe, who as Director of Missouri's Department of Corrections is nominally in charge, has testified that she knows nothing about Bucklew's medical condition and would defer to M2 and M3 regarding how to handle any issues that might arise during the execution, such as how to position Bucklew or obtain venous access. J.A. 583–85, 587–89, 595–96, 874–76 & n.5.

The discretionary judgments of the medical team will substantially impact Bucklew's degree of suffering, yet the team will not have the information necessary to make informed judgments. The one-page summary of Bucklew's medical condition is likely to be inadequate, J.A. 682–84, and Precythe does not intend to tell the medical members of the execution team about Bucklew's condition or give M2 or M3 access to him prior to the execution. J.A. 585–86. At best, Precythe testified that she did not know how Bucklew's condition would be handled. J.A. 586.

The medical team's ignorance of Bucklew's condition is plainly relevant to his constitutional claim. The less the team knows, the greater Bucklew's risk of needless suffering. Their ignorance can take an already deeply troublesome situation and make it even worse. For example, and as noted above, stress (such as when the team tries but fails to obtain venous access) makes it more likely that Bucklew's tumors will bleed, causing him to choke on his own blood and struggle to breathe. The medical team's knowledge or lack thereof thus bears directly on Bucklew's risk of "unnecessary cruelty" or a "lingering death." *Baze*, 553 U.S. at 48–49 (plurality opinion) (quoting *Wilkerson v. Utah*, 99

U.S. 130, 136 (1879) and *In re Kemmler*, 136 U.S. 436, 447 (1890)). It would be reasonable to impose limitations that will protect the identities of those on the execution team (*e.g.*, a protective order, the use of telephonic depositions, or the submission of written interrogatories), but not to deny relevant discovery altogether.

Second, discovery will reveal the medical team's qualifications and plans regarding venous access. The execution protocol allows for an attempt to gain access through a central vein, like the femoral artery, but only if the medical team is qualified to attempt such a procedure. J.A. 213–14. That is, the protocol itself makes the qualifications of the medical team directly relevant to Bucklew's claim. As noted above, it is highly likely that gaining IV access through a peripheral vein will fail. J.A. 332–33, 338, 351, 183, 186–187, 231–32. Bucklew knows that members of the execution team have previously attempted a cut-down procedure, but he does not know (a) whether they would attempt to obtain access via a peripheral vein first, (b) whether they plan to use a cut-down procedure in his case, or (c) how exactly they would implement a cut-down procedure—all of which bear on the risk of suffering he faces.

Third, the State's own appellate strategy confirms the urgent need to obtain discovery regarding the medical team's actual plans and expectations. The summary judgment record reflects that inmates in prior executions have been required to lie supine, and no one testified that Bucklew would be treated any differently. So Bucklew reasonably inferred that he, too, will be forced to lie supine during his execution, which will increase his suffering. But then, on Bucklew's petition for rehearing in the court of appeals—and less than one week before the scheduled

execution—respondents submitted a new affidavit of a new witness purporting to provide minimal (and inadequate) assurance that Bucklew will not be "fully supine at the time the Department administers the lethal chemicals." J.A. 882. This affidavit only underscores the need for further discovery. It is incomplete, as it does not address whether Bucklew will have to lie supine during a cut-down procedure. It is inconsistent with the testimony of Boyles's superior, who said that she would leave decisions regarding positioning to the medical team. And it is untested, in that Bucklew has had no opportunity to depose this new witness to learn her role in the execution or her authority to direct the medical members of the execution team.

No one wants another botched execution. *See, e.g.*, *Glossip*, 135 S. Ct. at 2734. Worse still would be an entirely preventable botched execution—particularly where discovery would reveal just how predictable failure may be. The botched execution of Doyle Hamm provides a case in point. It was well known that Hamm had cancer and weak veins in his upper extremities. *Hamm v. Dunn*, 138 S. Ct. 828, 828 (2018) (Mem.) (denial of petition for certiorari). Alabama agreed, pursuant to an affidavit submitted on appeal, to attempt venous access only through Hamm's lower extremities, something the State had never done before. *Hamm v. Comm'r, Ala. Dep't of Corr.*, 725 F. App'x 836, 839–40 (11th Cir. 2018) (per curiam). But the Eleventh Circuit denied Hamm the opportunity to investigate whether he would suffer serious harm under this last-minute material change. When Alabama attempted to execute Hamm, it failed because of the execution team's predictable inability to access a viable vein, despite repeated painful attempts

to do so. Had discovery been permitted, a gruesome failed execution could have been avoided.

Meaningful adversarial testing elicits truth. *See, e.g., Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring) ("Secrecy is not congenial to truth-seeking."). But the adversary process cannot "function effectively without adherence to rules of procedure that . . . provide each party with a fair opportunity to assemble and submit evidence." *Taylor v. Illinois*, 484 U.S. 400, 410–11 (1988). Cutting off relevant information only increases the risk of error. And in the case of an execution, a process that deprives the court of relevant information increases the risk of a catastrophic experience for the inmate, witnesses, and execution personnel. *Hamm*, 138 S. Ct. at 828–29 (Ginsburg, J., dissenting) (the "adversarial process" must be permitted to "test[ ] the risk of 'serious illness and needless suffering'" that is likely to occur during an execution). It is beneath the dignity of a society that aspires to respect the constitutional guarantee against cruel and unusual punishment to carry out executions by a process that promotes ignorance of the risks of avoidable suffering.

II. THE "KNOWN-AND-AVAILABLE-ALTERNATIVES REQUIREMENT" HAS NO PLACE IN AN AS-APPLIED CHALLENGE BASED ON AN INMATE'S UNIQUE MEDICAL CONDITION.

The known-and-available-alternatives requirement of *Baze* and *Glossip* addresses two primary concerns, one practical and the other substantive. The practical

concern is that, in the absence of an identified alternative, a facial challenge to a method of execution—as in both *Baze* and *Glossip*—could deprive the government of the only available means of carrying out capital punishment. The substantive concern is that a risk of pain accompanies *any* method of execution, which makes it difficult to assess whether exposing inmates to the risks inherent in a given method would be "cruel and unusual" without some comparator. Requiring an inmate to identify an available alternative ensures that executions may proceed, and that the only methods of execution that will be categorically removed from consideration are those that are clearly cruel and unusual when compared to known alternatives.

But Bucklew's as-applied challenge based on his unique medical condition presents neither of the concerns that animate *Baze* and *Glossip*. Whatever happens in this case, Missouri will remain free to use its standard lethal injection protocol with other inmates. And Bucklew's unique condition provides a straightforward predicate for evaluating the cruelty of his anticipated execution, irrespective of the specific alternatives that might be available. Unlike the challengers in *Baze* and *Glossip*, Bucklew does not argue that there is anything inherently wrong with the State's execution protocol, either in theory or in general practice. Instead, what makes Missouri's plans to execute Bucklew cruel and unusual is the fact that state officials *know* the protocol exposes Bucklew to a unique risk of gratuitous and wanton suffering based on his unusual medical condition, yet they plan to press forward all the same.

Bucklew should not bear the burden of identifying a known and available alternative when the State's existing protocol, as applied to him in particular,

violates the Eighth Amendment because it reflects the "barbarity of . . . mindless vengeance" rather than a proper respect for Bucklew's individual humanity. *Ford v. Wainwright*, 477 U.S. 399, 400 (1986); *see also Estelle*, 429 U.S. at 106 (forbidding actions reflecting "deliberate indifference to serious medical needs").

A. An As-Applied Challenge Based On An Inmate's Unique Medical Condition Will Not, In Effect, Ban Capital Punishment.

The main practical concern animating this Court's known-and-available-alternatives requirement is that method-of-execution claims should not, in effect, foreclose capital punishment altogether. Thus, for example, the plurality in *Baze* began its analysis "with the principle, settled by *Gregg* [*v. Georgia*, 428 U.S. 153 (1976)], that capital punishment is constitutional," which implies that "there must be a means of carrying it out." 553 U.S. at 47; *see also Glossip*, 135 S. Ct. at 2732–33. Likewise, the *Glossip* Court reasoned that proscribing one method of execution without identifying an alternative would "effectively overrule" a long line of cases holding that "capital punishment is not *per se* unconstitutional." 135 S. Ct. at 2739.

This practical concern has purchase in the context of a facial challenge to a particular method of execution. This Court has explained that a facial challenge requires proof that there is "no set of circumstances" in which the governmental action would be valid. *Salerno*, 481 U.S. at 745. Such challenges are the "most difficult . . . to mount successfully," *id.*, and they can have profound consequences. For example, the petitioners in *Baze* brought a facial challenge to a three-drug protocol that had been adopted by at least 30 of the 36 States that used lethal injection. If this Court had held the protocol was inherently cruel and unusual—such that it could not constitutionally be

applied to *any* inmate—then executions in those 30 States might have ground to a halt, creating a new moratorium on capital punishment like the one brought to an end by *Gregg* in 1976. The protocol challenged in *Glossip* was less widely adopted, but the effect of barring its use would have been no less dramatic in those States that had turned to midazolam when sodium thiopental and pentobarbital were no longer available. *See* 135 S. Ct. at 2734.

An as-applied challenge based on an inmate's unique medical condition is different. Bucklew's specific condition is so rare that it would be surprising if even *one* other inmate facing capital punishment nationwide—let alone in the State of Missouri—had it. To be sure, other inmates may assert that they, too, have a unique medical condition that renders a given execution protocol cruel and unusual as applied to them. But the possibility of a similar challenge does not prevent this court from setting an appropriate standard for evaluating the State's unwillingness to account for Bucklew's unique condition. *Cf., e.g., Estelle*, 429 U.S. at 104–05; *Farmer v. Brennan*, 511 U.S. 825, 835–40 (1994). Doing so does not "transform courts into boards of inquiry charged with determining 'best practices' for executions" writ large. *Baze*, 553 U.S. at 51 (plurality opinion). It ensures adequate judicial oversight and adversarial testing to protect against the horrors of predictably botched and failed executions.

In short, unlike the facial challenges of *Baze* and *Glossip*, an as-applied challenge cannot reasonably be expected to result in an order that has the effect of barring all executions—regardless of whether an inmate can identify a known and available alternative in a particular case. There is no system-wide reason to require an inmate raising an as-applied challenge

based on his unique medical condition to muster a less-cruel alternative.

B. An Inmate With A Unique Medical Condition Can And Should Be Permitted To Establish That A Given Method Of Execution, As Applied To Him, Would Be Cruel And Unusual Irrespective Of The Available Alternatives.

The known-and-available-alternatives requirement is also animated by a substantive concern regarding the application of the Eighth Amendment. In particular, the requirement helps address the difficulty of evaluating whether a given method of execution inherently presents a substantial and unjustified risk of severe pain. Without an alternative for comparison, it can be hard to tell whether a given method, in the abstract, presents too much of a risk of severe pain.

An as-applied challenge based on an inmate's unique medical condition does not present the same concern, however. State officials who know but choose to ignore the specific characteristics of a given inmate that make the inmate unusually susceptible to suffering severe pain under a given protocol practice a kind of cruelty forbidden by the Eighth Amendment.

1. For more than a century, this Court has understood the "cruelty" proscribed by the Eighth Amendment to include pain or suffering *gratuitously* imposed by the government. *See Wilkerson*, 99 U.S. at 136 ("[P]unishments of torture . . . and all others in the same line of *unnecessary cruelty*, are forbidden by that amendment to the Constitution." (emphasis added)); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) ("[T]he punishment must not involve the unnecessary and wanton infliction of pain."). For

capital crimes, the punishment of death is not itself unconstitutionally cruel, but methods of imposing death that are "inhuman and barbarous, something more than the mere extinguishment of life," are forbidden by the Eighth Amendment. *Kemmler*, 136 U.S. at 447. "The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself." *Resweber*, 329 U.S. at 474 (Burton, J., dissenting).

This constitutional prohibition on imposing gratuitous suffering reflects the "basic concept underlying the Eighth Amendment," which is "nothing less than the dignity of man." *Trop*, 356 U.S. at 100 (plurality opinion). The Eighth Amendment requires States to "respect the human attributes even of those who have committed serious crimes." *Graham v. Florida*, 560 U.S. 48, 59 (2010); *see also Roper v. Simmons*, 543 U.S. 551, 560 (2005) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."). As a leading scholar has explained, the "crux of governmental or societal cruelty is action toward citizens with such a lack of concern and respect as to degrade them and their significance as human persons." Margaret J. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. Pa. L. Rev. 989, 1044 (1978). Punishments that evince such a lack of concern through the imposition of gratuitous suffering "are too degrading (both to the victim and to the inflicter) to be tolerated." *Id.*

For this reason, this Court has long recognized that "[t]he methods we employ in the enforcement of our

criminal law have aptly been called the measures by which the quality of our civilization may be judged." *Coppedge*, 369 U.S. at 449. The Eighth Amendment's prohibition on torture and gratuitous suffering protects not only the dignity of the prisoner but also "the dignity of society itself from the barbarity of exacting mindless vengeance." *Ford*, 477 U.S. at 410; *see also Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring) ("The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man."); *Whitmore v. Arkansas*, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting) (explaining that "barbaric punishment" harms "basic societal values" and "the integrity of our system of justice").

There are certain categories of punishment that are "manifestly cruel and unusual," such that they are plainly forbidden by the Eighth Amendment without reference to any alternative methods. *Kemmler*, 136 U.S. at 446 (referring to "burning at the stake, crucifixion, breaking on the wheel, or the like"). This is because the "Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances." *Graham*, 560 U.S. at 59. Thus, for example, if the only legally authorized punishment for a given crime under state law were "torture," that punishment would be "forbidden" notwithstanding the fact that an inmate could not point to an available alternative (because, by assumption, no such alternative would exist). *Wilkerson*, 99 U.S. at 136. Notwithstanding some of the broader language in *Baze* and *Glossip*, this Court has not and should not be understood to have disavowed its repeated admonitions that torture and other forms of intentional infliction of gratuitous

suffering are *categorically* (not conditionally) forbidden. *See, e.g.*, *Baze*, 553 U.S. at 48 (plurality opinion) (referring to "forbidden punishments," which involved "the deliberate infliction of pain for the sake of pain—'superadd[ing]' pain to the death sentence through torture and the like" (quoting *Wilkerson*, 99 U.S. at 135)); *id.* at 101–02 (Thomas, J., concurring in judgment) ("It strains credulity to suggest that the defining characteristic of burning at the stake, disemboweling, drawing and quartering, beheading, and the like was that they involved risks of pain that could be eliminated by using alternative methods of execution.").

2. The standard set forth in *Baze* and *Glossip* responds to a different kind of problem. The challengers in each case did not allege that there was something inherently wrong either with lethal injection in general or even with the use of the combination of drugs at issue in either case—lethal injection is not inherently barbaric or torturous. Instead, the challengers contended that the State's protocols presented an unacceptable risk of suffering. *See Baze*, 553 U.S. at 47 (plurality opinion); *Glossip*, 135 S. Ct. at 2731.

As the *Baze* plurality explained, this type of facial challenge was complicated by the fact that "[s]ome risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure." 553 U.S. at 47. An inmate bringing such a challenge must establish that the risk of suffering associated with a given protocol is "objectively intolerable" by some metric, because an "isolated mishap alone . . . does not suggest cruelty." *Id.* at 50 (quoting *Farmer*, 511 U.S. at 846).

The known-and-available-alternatives requirement provides the needed metric. A facial challenge to an

otherwise-valid protocol—one that does not involve obvious torture, for example—requires proof of a "feasible, readily implemented" alternative that will "significantly reduce a substantial risk of severe pain." *Id.* at 52 (plurality opinion). A State that "refuses to adopt such an alternative" in the face of "documented advantages" acts with full knowledge of—or at least a patent indifference to—an unjustified risk of gratuitous suffering, and thus practices the kind of cruelty proscribed by the Eighth Amendment. *Id.* But if a facial challenge to a method of execution were considered in a vacuum and without a comparison to a known and available alternative, it would be difficult to tell whether the risk of pain is gratuitous rather than consistent with the typical risk associated with implementing capital punishment by any available means.

3. The known-and-available-alternatives requirement is a solution to a substantive puzzle that arises in the context of facial challenges to methods of execution. But an as-applied challenge based on an inmate's unique medical condition presents no such puzzle. Instead, the State's responsiveness (or indifference) to the inmate's medical condition is itself a basis upon which to evaluate whether the suffering associated with a proposed method is gratuitous and cruel.

In this case, for example, as discussed above, the State is well aware of the unique risk of suffering associated with implementing the State's standard protocol. Missouri knows, for example, that forcing Bucklew to lie supine will likely cause him to choke on his tumor and gag on his blood, experiencing a feeling of suffocation, as the medical team attempts to gain the venous access necessary for lethal injection. The State is likewise aware of the likelihood that members

of the execution team will use a painful cut-down procedure (as they have in the past), and the fact that such a procedure is all but certain to exacerbate the suffering to which Bucklew is uniquely susceptible. Nevertheless, the State intends to press on with its standard-issue protocol without even informing the execution team of the most serious risks associated with Bucklew's unique medical condition.

This Court has explained that even those convicted of the most serious crimes are "uniquely individual human beings," rather than "members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). Implementing a penalty that "accord[s] with 'the dignity of man'" requires recognition of an individual's humanity. *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987). Where, as here, an individual inmate has a unique medical condition that presents a substantial and particular risk of grave suffering, recognition of the inmate's humanity entails attention to that substantial and particular risk. On the other hand, indifference to an inmate's serious medical needs—and what those needs entail in connection with a method of execution—"constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Estelle*, 429 U.S. at 104 (citation omitted). Such indifference to the humanity of a particular inmate on the part of the State is unconstitutionally cruel regardless of whether the inmate has identified an alternative method of execution. This Court should not countenance it.

III. THE RECORD AS A WHOLE ESTABLISHES THAT A LETHAL GAS EXECUTION WILL SUBSTANTIALLY REDUCE THE RISKS BUCKLEW FACES FROM MISSOURI'S LETHAL INJECTION PROTOCOL.

Even if this Court imposes on Bucklew the requirement to plead and prove the existence of a feasible and reasonably available alternative that will substantially reduce the risk of suffering he faces, it should still reverse the decision below.

The Eighth Circuit's decision rests on its view that lethal gas—which is undisputedly a feasible and available alternative—will not substantially reduce the risk of suffering that Bucklew faces from Missouri's lethal injection protocol. But that ruling was based on a fundamental error: the Eighth Circuit refused to consider the summary judgment record as a whole. Instead, it asked whether Bucklew had produced a single witness who believed that lethal gas would substantially reduce the risks he faces. J.A. 867–68. This single-witness rule finds no support in this Court's precedent. In an as-applied method of execution case, it is also perverse.

Evidence at summary judgment is evaluated in light of the record as a whole. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); Fed. R. Civ. P. 56(c)(1). The record as a whole comprises all evidence submitted by plaintiff and defendant alike. Accordingly, every court of appeals—including the Eighth Circuit—has recognized that a plaintiff may rely on testimony from a defendant's expert to meet plaintiff's own burden. *United States v. González-Vélez*, 587 F.3d 494, 504 (1st Cir. 2009); *United States v. Norman*, 776 F.3d 67, 78 (2d Cir. 2015); *United States v. Boone*, 279 F.3d 163, 189 (3d Cir. 2002);

Trademark Props., Inc. v. A&E TV Networks, 422 F. App'x 199, 212 (4th Cir. 2011); *United States v. Merida*, 765 F.2d 1205, 1220 (5th Cir. 1985); *Dixon v. Penn Cent. Co.*, 481 F.2d 833, 837 (6th Cir. 1973); *United States v. Rollins*, 544 F.3d 820, 835–36 (7th Cir. 2008); *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 782 (8th Cir. 2016); *United States v. Clevenger*, 733 F.2d 1356, 1358–59 (9th Cir. 1984); *United States v. Ransom*, 691 F. App'x 504, 506 (10th Cir. 2017); *United States v. Prince*, 883 F.2d 953, 959 n.3 (11th Cir. 1989); *Brooke v. United States*, 385 F.2d 279, 282–83 (D.C. Cir. 1967); *Anderson v. Dep't of Transp., FAA*, 827 F.2d 1564, 1570 (Fed. Cir. 1987) (per curiam).

The Eighth Circuit refused to consider the record as a whole in two respects. First, it considered the testimony of the experts piecemeal, rather than considering what a reasonable factfinder could have concluded had it heard the whole of what both experts had to say. Second, it did not weigh in the calculus of risks any of the substantial risks that the lethal injection protocol poses to Bucklew *before* the lethal drug is administered. Either error warrants reversal. The combined impact of both provides a particularly compelling need for a trial.

1. Considering only the risk Bucklew faces from lethal injection *after* the lethal drug is administered, a reasonable factfinder could conclude that lethal gas would substantially reduce that risk. Bucklew faces a risk of experiencing a sense of suffocation once he's rendered unconscious by either method, and loses the ability to manage breathing in light of the tumor that can block his airway. J.A. 822, 432, 460–61, 470–72, 463–66, 233–35. How long he will experience that sense of suffocation was the subject of dispute between the experts.

Bucklew's expert (Dr. Zivot) opined that Bucklew will experience a sense of suffocation for several minutes if lethal injection is used. J.A. 195–96. The State's expert (Dr. Antognini) disagreed; he believes that lethal injection would render Bucklew insensate to suffering within 20-30 seconds. J.A. 303. The district court acknowledged this dispute and accepted that a reasonable factfinder could conclude that Bucklew would experience a sense of suffocation for several minutes. J.A. 822–23, 826–27.

Dr. Zivot offered no opinion about how long he would experience a sense of suffocation from lethal gas. But Dr. Antognini opined that lethal gas would be "just like" lethal injection in this respect, meaning that Bucklew would experience a sense of suffocation for only 20-30 seconds. J.A. 456, 460.

In light of this record, a reasonable factfinder could credit Dr. Zivot with respect to the risk posed by lethal injection and credit Dr. Antognini with respect to the risk posed by lethal gas. Neither the district court nor the court of appeals doubted that a difference between 20-30 seconds of suffocating (likely including choking on one's own blood) and several *minutes* of the same is substantial. But the Eighth Circuit refused to examine the record that way.

The Eighth Circuit rejected Bucklew's argument because "his expert" did not compare the two methods himself. This novel single-witness requirement—for which the panel majority provided no citation—finds no basis in this Court's precedent. *Glossip*, at most, requires a comparison between the State's method and a petitioner's alternative method. *Glossip*, 135 S. Ct. at 2737. But it nowhere requires that a single witness compare the two, much less that the evidence distinguishing between the two come from an expert hired by the inmate.

In a typical civil case, the Eighth Circuit's approach to evaluating a summary judgment record would be merely wrong, but in a challenge to a method of execution, it is perverse. Meeting the single-witness requirement in this context would likely entail hiring an expert who is either unqualified or ethically unable to render the requisite opinion. Witnesses without medical training are likely unqualified to offer a relevant opinion, but those with the requisite medical training are likely to be unable, consistent with professional ethical standards, to propose an alternative method of execution that will substantially reduce the risk of suffering. *See Baze*, 553 U.S. at 64 (Alito, J. concurring) ("Prominent among the practical constraints that must be taken into account in considering the feasibility and availability of any suggested modification of a lethal injection protocol are the ethical restrictions applicable to medical professionals.") Here, for example, Dr. Zivot explained why he could not opine on a method of execution that would result in significantly less suffering than the lethal injection protocol proposed by the State: he is ethically barred from proposing a method of execution at all. J.A. 219–20.

There is no reason to insist that a factfinder accept or reject a witness's testimony *in toto*. This Court has long recognized that "[p]roof can be made in any form," *Graver Tank & Mfg. Co. v. Linde Co.*, 339 U.S. 605, 609 (1950), and indeed that a plaintiff can meet his burden "through presentation of his own case and through cross-examination of the defendant's witnesses." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507–08 (1993) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). If cross-examination is to function as an "engine . . . for the discovery of truth," *California v. Green*, 399 U.S. 149,

158 (1970) (quoting 5 Wigmore, *Evidence in Trials at Common Law* § 1367 (3d ed. 1940)), the finder of fact must be permitted "to credit or discredit *all or part* of the testimony" presented to it. *Moore v. Chesapeake & Ohio Ry.*, 340 U.S. 573, 576 (1951) (emphasis added); *cf. Lavender v. Kurn*, 327 U.S. 645, 653 (1946) (explaining that, so long as there is an "evidentiary basis" for a jury's verdict, "the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion"). Otherwise, the truth-seeking function of the adversarial process will be distorted by a false assumption that each witness's testimony must be entirely reliable or entirely unreliable.

2. The Eighth Circuit gave no attention to the reasons to believe lethal gas will substantially reduce the risks Bucklew faces from a lethal injection protocol *before* the lethal drug is administered. As detailed above, Bucklew faces a number of severe risks that stem from the difficulty the execution team will have in gaining venous access. For example, there is the increased stress of multiple efforts, being subject to a cut down procedure to gain access through the femoral vein, and being forced to lie down during the painful cut down and thus having to manage his tumor's position in his throat as well as any bleeding from it so that he can breathe. *See supra* pp. 10–12. All of these risks would be eliminated or at least substantially reduced through a lethal gas protocol that would not require venous access at all. It was error for the Eighth Circuit to ignore that substantial reduction in risk.

IV. PETITIONER MET THE EVIDENTIARY BURDEN TO DEFEAT RESPONDENTS' MOTION FOR SUMMARY JUDGMENT REGARDING THE COMPARISON *GLOSSIP* REQUIRES OF LETHAL GAS AND LETHAL INJECTION.

When respondents moved for summary judgment in this case, they did not deny that lethal gas presented a readily available and feasible alternative method of execution. J.A. 827. At the summary judgment stage, Bucklew thus met his burden under *Glossip* to show a "feasible, readily implemented" alternative, 135 S. Ct. at 2737, based on respondents' failure to dispute the point. And Bucklew met his burden to show that this undisputedly available alternative would significantly reduce his risk of pain based on the evidence above, *see supra* Part III, including evidence that the lethal-gas alternative would allow Bucklew to avoid the suffering associated with having a prolonged period of suffocation, during which Bucklew is conscious and choking on his own blood.

Beyond this, nothing in *Glossip* required Bucklew to detail the specific procedures that would be used for a lethal gas execution. And this Court should not create a substantive legal obligation for an inmate raising a method-of-execution claim to do so either. While the record here provides ample reason to believe that lethal gas can be readily implemented, the State has greater resources to investigate how best to implement a method of execution, greater knowledge of the facilities available to it, and, ultimately, the final say on what procedures it is willing to undertake to execute someone. In short, the Court should not read the Eighth Amendment to require an inmate to design the specific details for his own execution.

A. Respondents Did Not Dispute That Lethal Gas Was A Feasible And Readily Available Alternative Method When Moving For Summary Judgment.

When respondents moved for summary judgment, they did not contest the availability and feasibility of nitrogen hypoxia as an alternative method of execution. J.A. 827. They argued only that no reasonable factfinder could conclude that nitrogen hypoxia would substantially reduce the risk of Bucklew's suffering. As a result of respondents' strategic choice, Bucklew had no obligation in opposing summary judgment to explain the factual basis for his assertion that lethal gas was a feasible and readily available alternative. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-61 (1970); *see also Ricci*, 557 U.S. at 586; *Matsushita*, 475 U.S. at 586. Instead, Bucklew properly focused on the comparative risk of suffering, and how a reasonable finder of fact could find, based on the record as a whole, that the lethal-gas alternative would substantially reduce a significant risk of severe pain. *See supra* Part III.

Respondents could have disputed the feasibility and availability of the lethal-gas alternative at summary judgment, but they made a strategic decision not to do so. Perhaps they were concerned about the optics of having ignored the Missouri legislature's express direction that they develop a protocol for lethal gas. *See* Mo. Rev. Stat. § 546.720. Indeed, the record indicates that respondents simply gave up after a mere Google search regarding the method. J.A. 490–92. Or perhaps they recognized that the record showed that administering lethal gas would be simple—there is reason to believe it would require little more than a secure mask. J.A. 736. Several other States have adopted lethal gas a permissible method of execution.

Okla. Stat. tit. 22, § 1014.B; Ala. Code § 15-18-82.1; Ariz. Rev. Stat. Ann. § 13-757.B; Cal. Penal Code § 3604; Miss. Code Ann. § 99-19-51(2); Wyo. Stat. Ann. § 7-13-904(b).

If Bucklew were required to show—notwithstanding respondents' failure to dispute the point—that lethal gas is feasible and readily available, the record would have been more than sufficient to persuade a reasonable finder of fact. But respondents made the strategic decision to concede the point and cannot now challenge the sufficiency of the evidence.

B. An Inmate Challenging His Method Of Execution Need Not Design The Protocols For His Own Execution.

There is nothing in *Glossip* or *Baze* that requires a prisoner to prove more than that an alternative method of execution that will significantly reduce the risk of severe pain is feasible and readily available. Even assuming the known-and-available-alternative requirement from *Glossip* and *Baze* is extended to as-applied challenges, there is no reason in this Court's prior decisions or any value reflected in the Constitution to require an inmate to do more than prove that a State *has* other available options. *How* a State implements those other options—the detailed protocols and procedures it adopts—are ultimately up to the State. An inmate need not specify every last step the State should take along the path to killing him.

First, States are in a much better position than inmates to develop the detailed protocols for execution. For example, not only does Missouri have experience crafting execution protocols, once it has developed a protocol, it closely guards information about its detailed procedures to prevent exposure to the public. *See, e.g.*, J.A. 889–997 (sealed procedures for

execution); *In re Ohio Execution Protocol Litig.*, 845 F.3d 231, 241–42 (6th Cir. 2016) (upholding a protective order cutting off discovery into the State's execution procedures because of the risk that disclosure would subject the State to "the risk of harm, violence, and harassment"), *cert. denied sub nom. Fears v. Kasich*, 138 S. Ct. 191 (2017). In contrast, prisoners have extremely limited access to resources, and they have no relevant expertise or experience in developing protocols for any aspect of prison administration, let alone protocols for execution. In any event, the development of detailed protocols often takes significant time and resources, even for the State.[6]

Second, as noted above, although an inmate may be able to find medical experts who are willing to provide testimony regarding the risk of suffering they face under an existing protocol, ethical constraints on medical professionals make it difficult to find anyone willing to assist an inmate in designing his execution.

Finally, forcing an inmate to design a detailed step-by-step protocol for his execution does nothing to advance the purpose of the known-and-available-alternatives requirement. Once it is clear that the

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[6] Oklahoma adopted nitrogen gas inhalation as a backup method of execution in April 2015, and announced in March 2018 that it would execute all death row inmates going forward using nitrogen gas. In the more than two and a half years since Oklahoma authorized execution by lethal gas, however, it has yet to develop a protocol for implementing an execution by nitrogen hypoxia. Mark Berman, *Oklahoma says it will begin using nitrogen for all executions in an unprecedented move*, Washington Post (Mar. 14, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/03/14/oklahoma-says-it-will-begin-using-nitrogen-for-all-executions-in-an-unprecedented-move/?noredirect=on&utm_term=.0959c8bbd9c0.

alternative that will avoid the imposition of severe pain is "feasible" and "readily implemented"—even if the details of its implementation have not all been worked out—then a State's "refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." *Baze*, 553 U.S. at 52 (plurality opinion). The fact that an inmate has not determined exactly how many medical team members need to be in the execution chamber, what steps should be taken to secure his gas mask, or how he should be strapped to a chair or adjustable gurney—or any number of other details of the administration of his punishment for that matter—should not absolve the State of its cruel decision to let him suffer gratuitous pain when a much less painful alternative is known and readily available.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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